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Nos. 98-404 and 98-564

IN THE

Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT
OF COMMERCE, ET AL.,

Appellants,

v.

UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,

Appellees.

**On Appeal From The United States District Court
For The District Of Columbia**

REPLY BRIEF FOR APPELLEES RICHARD A. GEPHARDT, DANNY K. DAVIS, JUANITA MILLENDER-McDONALD, LUCILLE ROYBAL-ALLARD, LOUISE M. SLAUGHTER, and BENNIE G. THOMPSON SUPPORTING APPELLANTS

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This Court should allow the Census Bureau to proceed with its planned methodology for conducting the 2000 Census. Use of this methodology, which will substantially increase accuracy of the census and reduce the undercount of groups that have traditionally been excluded, is plainly acceptable under

the only harmonious interpretation of the Census Act, as well as under the Constitution.

Appellees devote the bulk of their arguments on the merits to the claim that the Census Act precludes the Census Bureau from using sampling in the 2000 Census. Although appellees also make a nominal effort to argue that the use of sampling is unconstitutional, appellees gloss over the many arguments in the opening briefs that clearly demonstrate the fallacy of this claim. Similarly, although appellees argue that the Census Bureau's planned methodology may actually decrease accuracy and increase political manipulability, they cannot actually rely on these arguments -- which are erroneous in any case -- given that they are making a facial challenge to the use of sampling, they never contested accuracy as a basis for their claim in the court below, and they are defending grants of *summary* judgment.[1] Intervenors will therefore focus this reply on the primary issue before this Court: whether the Census Bureau's planned methodology is permissible under the Census Act. Because the answer is yes, this Court should reverse.

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[1] Appellees Glavin *et al.* spend significant effort trying to demonstrate that one of the two types of sampling the Census Bureau plans to use, sampling for nonresponse follow-up, decreases accuracy. Glavin Br. 2-3, 41-42. But appellees are challenging both types of sampling the Bureau plans to use. Moreover, sampling for nonresponse follow-up does help ensure accuracy by shortening the time required for the initial count and thus improving the effectiveness of the next phase of the process. Bureau of the Census, U.S. Dep't of Commerce, *Report to Congress -- The Plan for Census 2000*, JA 89-90 (rev. Aug. 1997). And by allowing the Bureau to save significant money, it enables the Bureau to undertake the Dual System Estimation process and thereby enhance accuracy overall.

I. THE PLAIN LANGUAGE OF THE CENSUS ACT PERMITS SAMPLING.

Appellees fail to refute intervenors' showing that the most harmonious reading of the Census Act allows the Census Bureau to proceed with its planned methodology for the 2000 Census. This failure is fatal. Because the language of the Act, properly interpreted, points to a single correct interpretation, appellees' analysis of legislative "intent," based on history, presumptions, and legislative silence, is irrelevant. Moreover, it is flawed on its own terms.

Read together, sections 141 and 195 of the Census Act plainly permit sampling for purposes of apportionment. Appellees do not deny that on its face section 141 of the Act authorizes sampling for all purposes in the decennial census including apportionment, which is, after all the central purpose of the decennial census; indeed, appellees Glavin *et al.* forthrightly acknowledge that "[s]tanding alone, this provision would authorize the Secretary to sample for all purposes encompassed by the 'decennial census of population,' including determining the population number to be used for congressional apportionment." Br. 26.

Appellees also acknowledge the obligation to read different statutory sections harmoniously. *See, e.g., id.* at 27. Yet appellees, while arguing that the best interpretation of section 195 standing alone is that it prohibits sampling for purposes of apportionment, do not contend that this is the only possible reading of the text. Nor do they seriously contest that intervenors' interpretation is the more harmonious one. Under that interpretation, the Census Bureau is required to use sampling, if feasible, outside of the context of apportionment

and is allowed to use sampling within the context of apportionment. As a result, sections 141 and 195 both have meaning and there is no need to read a gaping exception into section 141 with respect to sampling used for apportionment purposes.[2] Appellees' interpretation, in contrast, creates such a gaping exception. Section 141's authorization of the use of sampling in the decennial census is read as not extending to

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[2] Appellees Glavin *et al.* argue that intervenors' interpretation fails to give meaning to the "except" clause in section 195. They assert that if the except clause did not exist, the Bureau would nonetheless have discretion to determine whether to use sampling for apportionment -- which intervenors assert is the purpose of the except clause. Glavin Br. 27-28; *cf.* House Br. 34 ("the feasibility standard established in § 195 would surely be broad enough to permit the Secretary to insist upon the use of the method that will produce the most accurate population figures practicable") (quotation omitted). This is nonsense. As appellees themselves acknowledge, "Section 195 limits the Secretary's discretion concerning the circumstances in which non-apportionment sampling may be used" by requiring use of such sampling, if feasible, Glavin Br. 29; in the absence of the except clause, this same limitation would apply to sampling for apportionment purposes.

Thus, absent the "except" clause, the Bureau would at least arguably be obliged to use sampling for apportionment, so long as a reasonable case could made that sampling was accurate, even if the Bureau was not yet confident that sampling was the best method. The term "feasible" would provide the Bureau some discretion to refrain from using sampling, but not nearly as much as existed once Congress exempted apportionment from the requirement altogether. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971) ("the requirement that there be no 'feasible' alternative route admits of little administrative discretion"); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981) (holding that a requirement conditioned on feasibility was conditioned on whether it was capable of being done). In creating the exception, Congress intended to make absolutely clear that the Census Bureau had discretion not to sample even if it thought that sampling was "capable of" producing data that could be used for apportionment.

apportionment, the core purpose of the decennial census.[3] Under appellees' interpretation, therefore, section 195 is not simply redundant with section 141 rendering it "of no substantive import," as the House acknowledges to be true, House Br. 30, it takes *back* some of the authority to sample that section 141 explicitly provides. As a result, unless it is not "reasonably possible" to read section 195 as intervenors suggest, intervenors' harmonious interpretation, not appellees' discordant one, is correct. *Louisiana Pub. Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986); Gephardt Br. 17-18 (citing cases).

Appellees insist that intervenors' harmonious interpretation must be rejected because section 195 unambiguously prohibits sampling for apportionment purposes. But appellees do not argue that the *language* of section 195 unambiguously prohibits sampling. Appellees instead rely on historical inferences, free-standing presumptions, and legislative silence to argue that the meaning of the Census Act is not plain, *see* House Br. § II.A., and they then argue that because the meaning is not plain, this Court must rely on the same inferences, presumptions and legislative silence to interpret the Act, *see* House Br. 38. Such an effort to "bootstrap" a non-textual statutory interpretation should not be countenanced.

As intervenors showed in their opening brief, ordinarily the except/shall structure contained in section 195 does not

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[3] Appellees point out that under each parties' interpretation, section 195 limits the discretion granted by section 141, by requiring the use of sampling, if feasible, outside the context of apportionment. House Br. 29, Glavin Br. 29. But the fact that the two sections are not entirely harmonious outside the context of apportionment does not justify interpreting them as flatly inconsistent within the context of apportionment.

constitute a prohibition, especially in a statutory context. Gephardt Br. 20-22.[4] Appellees offer little to refute this. Instead, they respond that the language of section 195 does not clearly enough *allow* sampling to be read in its ordinary way given that "it is exceedingly unlikely" that Congress would have given the Census Bureau authority to sample in light of the statutory and historical context, and there is no "plausible alternative explanation of why Congress would have excepted apportionment from § 195's mandate" other than that it intended to prohibit sampling for apportionment. House Br. 32-34; *see id.* at 38 (describing "[t]he absence of plain language to *support* [intervenors'] argument") (emphasis added). Appellees are incorrect with respect to their assessment as to what Congress was likely to have done and their evaluation of the historical context, but more important, none of these assessments of "likeliness" and "plausibility" show that section 195 *unambiguously* prohibits sampling. As a result, this Court should read section 195 as allowing sampling for apportionment purposes, because only that interpretation makes section 195 harmonious with section 141. Indeed, such an interpretation of section 195 is the only reasonable one, because rather than relying on an assessment of what Congress was likely to have done with respect to sampling, it relies on what Congress did do in section 141. Any claims of "obliqueness" or "ambiguity" are eliminated when the two sections are read together.

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[4] Contrary to the claim of appellees Glavin *et al.*, Br. 37-38, the fact that the "shall" in section 195 is cabined by the phrase "if feasible" is not relevant for determining the meaning of the exception. For example, the sentence "except for federal holidays, law clerks shall, if feasible, report to work on Monday through Friday" leaves the clerks discretion to come to work on federal holidays despite the use of the phrase "if feasible" in the "mandatory" part of the sentence.

Moreover, appellees' assessment of "plausibility" is simply incorrect. Appellees argue that in light of the constitutional significance of apportionment and the existence of standards governing the use of sampling outside the apportionment context, it is implausible that Congress would have delegated unfettered discretion to the Census Bureau to use sampling in the apportionment context. House Br. 32-33. But the discretion delegated by the Census Act is not unfettered -- it is fettered by the constitutional requirement of reasonable accuracy, *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996), and the statutory requirement that the census produce a tabulation of the "whole number of persons in each state." 2 U.S.C. § 2a; *Franklin v. Massachusetts*, 505 U.S. 788, 819-20 (1992) (explaining that section 141 is not standardless, because section 2a "embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.") (Stevens, J., concurring in the judgment, joined by Blackmun, J., Kennedy, J., Souter, J.). And, in any event, it is perfectly plausible that a Congress that believed that the Census Bureau should be required to use sampling, if feasible, outside the context of apportionment, including, for example, to gather population figures in the mid-decade census, would have determined that the Census Bureau should at least be allowed to use sampling in the apportionment context.[5] The special constitutional status of the census (and continuing doubts about the accuracy of existing sampling techniques for apportionment

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[5] The plausibility of such a delegation of authority is not in any way undercut by the fact that section 181 only allows the Census Bureau to use sampling to gather annual population data if it first determines that sampling will produce reliable data. House Br. 33. Congress chose to supply such standards with respect to the gathering of annual population figures, because the Constitution and section 2a did not already supply such standards, as they do with respect to apportionment.

purposes) simply explain why Congress did not *require*, if feasible, the use of sampling for apportionment.

Because it is perfectly plausible on its face that section 195 simultaneously requires that the Census Bureau use sampling, if feasible, outside the context of apportionment, and provides discretion to use sampling in the context of apportionment, section 195 -- even considered alone -- cannot be read to prohibit sampling for purposes of apportionment. The only examples appellees provide in which an exemption from a mandate reflects an unexpressed prohibitory intent are ones in which the nature of the mandate *on its face* makes it implausible that the speaker intended to establish anything but a prohibition in the excepted area. A woman who directs a servant to take all of her clothes to the cleaners except one particular item of clothing (*e.g.*, a wedding dress) has clearly considered which of her clothes should be taken to the cleaner and which should not; there is simply no plausible reason why she would allow the servant to determine whether to take the remaining item to the cleaner. In contrast, because it *is* plausible on its face that Congress would want to leave the expert Census Bureau discretion to use sampling for apportionment, section 195 cannot be read as prohibiting the Bureau from doing so.

II. APPELLEES' NON-TEXTUAL ARGUMENTS ARE EVASIVE AND ULTIMATELY UNPERSUASIVE.

Appellees ask this Court to depart from the best reading of the language of the Census Act based on assertions about congressional "intent" supposedly grounded in the history of the census and the Census Act. But this approach, in addition to being wrong in principle, *see, e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-78 (1992), is

unpersuasive on its own terms because appellees overstate the evidence supporting their interpretation, while making only passing reference in footnotes to facts that contradict their view.

A. Neither Congress Nor the Census Bureau Had, Prior to 1976, Evinced a Long-Standing Aversion to Sampling.

First, appellees attempt to show that the 1976 Amendments, if interpreted to allow sampling, would have been an abrupt departure from two centuries of contrary practice. That is a vast overstatement. The legislation in the 19th and early 20th century prescribing methods for census taking did not constitute a conscious rejection of accuracy-enhancing sampling techniques, because those techniques were simply not known. Gephardt Br. 29-30.[6] This was still true in 1957 when Congress exempted apportionment from its

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[6] The forms of demographic *estimation* known to the Framers were nothing like the scientific statistical methodologies that the Census Bureau plans to employ in the year 2000. Colonial population estimation "rested substantially upon an elaborate fabric of educated guesses." James H. Cassedy, *Demography in Early America* 72 (1969). In particular, "Jefferson's method of obtaining his summary figures is confusing and apparently not accurate . . . ." Evarts B. Greene & Virginia D. Harrington, *American Population Before the Federal Census of 1790*, at 142 n.10 (1932). And even if Jefferson's technique had been accurate, Jefferson had no way of knowing this to be so and no reason to expect that it would be accurate if applied more generally. Nonscientific estimation methods lack the certainty and reliability of modern statistical sampling methodologies, which permit rates of error to be measured and thus controlled. *See Report to Congress*, JA 116-17. It is little wonder, then, that until recently Congress required the census to be taken primarily by inquiry at each household, because until recently no reliable method existed that could more accurately ascertain the size and distribution of the American populace.

authorization to the Census Bureau to use sampling; Congress was concerned only with long-form type sampling aimed at efficiency rather than increased accuracy. *Id.* at 8-9, 33-35. It was not until the 1970s that broad-based sampling techniques designed to increase the accuracy of the census became prominent. By that time a smaller scale version of sampling -- imputation -- had already been used and implicitly accepted for over thirty years, two other forms of sampling had been used to increase the accuracy of the 1970 census and praised in a congressional report, and Congress had already adopted a significant number of innovations in the census designed to increase accuracy, or conferred discretion on the Census Bureau to do so. *Id.* at 5, 30-31 & n. 21.[7] Moreover, just before it amended the Census Act in 1976, Congress held hearings in which it discussed the use of statistical techniques, including sampling, to increase the accuracy of the census, without any Members expressing doubt as to the desirability of using such techniques when they were fully developed. *Id.* at 32. Thus, it is entirely plausible -- indeed logical -- to infer that Congress in 1976 decided to make clear by amending the Census Act that the Census Bureau had the discretion to use these new techniques.

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[7] While admitting that "Congress has delegated the Secretary greater authority over the course of time," the House contends that a few of the 1976 amendments actually limited the Secretary's discretion somewhat. House Br. 37 n. 50. But this hardly undermines the argument that the grant of discretion to the Secretary to use sampling for apportionment was consistent with a long-standing historical trend. Indeed, this trend was evidenced in the 1976 legislation itself in areas that include, but also go beyond, sampling. Thus, section 141(a) and (d), for example, give the Secretary broad-based authority to conduct the decennial and mid-decade censuses "in such form and content as he may determine." Moreover, the House does not deny the existence of a second historical trend towards adoption of innovations designed to enhance accuracy.

Appellees fail in their attempt to minimize the significance of this historical evidence. They argue that the use of statistical imputation since 1940 is somehow consistent with the existence of a continued congressional aversion to sampling, because imputation was only used as a last resort to fill in the gaps left by a headcount. House Br. 50 n. 69. But this does not alter the fact that from 1940 onward statistical imputation was viewed as a reasonable means of enhancing the accuracy of the census. Moreover, the statistical techniques planned for the 2000 Census are in many respects quite similar to statistical imputation in that they are used to adjust the results of an inaccurate headcount. *See* Glavin Br. 2-3 ("The Department will simply estimate the number and demographic composition of these unknown persons by *imputing* to them the population and demographic characteristics of the nearest nonresponding households.") (emphasis added and deleted).

Appellees similarly attempt to deflate the importance of the sampling techniques used in 1970 by contending that they made the Census Bureau "uneasy." House Br. 37, n. 51. But regardless of the uneasiness of the Bureau about the arguable illegality of these techniques at the time, these techniques were ones that a congressional report expressly endorsed and suggested expanding, making it plausible, indeed likely, that Congress decided to make clear the legality of these techniques and other similar ones in 1976. The House suggests that Congress may have forgotten that these techniques had been used in 1970 by the time it enacted the 1976 amendments. *Id.* at 43. But it is reasonable to presume that a Congress that had issued a report praising these techniques, and that had continuing responsibility for overseeing the Census Bureau, understood the fairly extensive use of sampling that had occurred in the census a mere six years earlier. Certainly, in assessing whether it is plausible that Congress in 1976

conferred discretion on the Census Bureau to use sampling for apportionment, the history of the 1970 census is more relevant than the 1790 or 1800 censuses on which appellees rely.

Appellees also argue, in a variant of their claim that the dog did not bark, that the history of congressional acceptance of innovations designed to increase the accuracy of the census and/or confer increased discretion on the Census Bureau is irrelevant, because prior innovations were only adopted after extensive congressional debate, whereas there was little debate on the use of sampling for apportionment in 1976. House Br. 37, n.50. But apart from the fact that this Court has correctly expressed caution as to the value of legislative silence as a means of inferring congressional intent, Gephardt Br. 27-28, appellees are simply incorrect that prior innovations always engendered substantial controversy. For example, appellees do not dispute that the Census Act, as currently worded, allows the Census Bureau to adjust the results of a headcount by using birth and death statistics and that 1976 congressional hearings evidenced some support in Congress for such an adjustment, *id.* at 23; yet Congress never at any point explicitly discussed whether to confer such authority on the Census Bureau. Similarly, when Congress in 1957 conferred authority on the Census Bureau to use sampling outside the apportionment context, it did so with only minimal discussion in the legislative history and no apparent controversy. S. Rep. No. 85-698, (1957), *reprinted in* 1957 U.S.C.C.A.N. 1706, 1708; H.R. Rep. No. 85-1043 (1957); *Amendment of Title 13 United States Code, Relating to Census: Hearings on H.R. 7911 Before the House Comm. on Post Office and Civil Service*, 85th Cong. (1957). And in 1964, when Congress conferred on the Census Bureau authority to conduct the census by mail, it also did so without controversy, although with somewhat more extended discussion. It did not, however, discuss the many

ways in which the Census Bureau could potentially have used its newfound discretion beyond adoption of a mail out census. Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737 (1964); S. Rep. No. 88-1474 (1964), *reprinted in* 1964 U.S.S.C.A.N. 3308; H.R. Rep. No. 88-373 (1964). Finally, in 1977, when Congress considered (and ultimately rejected) *requiring* development and use of statistical techniques to correct for the undercount, there was very little mention in hearings of this proposed requirement. H.R. 8871, 95th Cong. § 144 at 137 (1977) (introduced on August 7, 1977 by Cong. William Lehman and Patricia Schroeder), *reprinted in The Census Reform Act: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service,* 95th Cong., at 137 (1977); H.R. 10386, 95th Cong. § 143 (1977) (introduced on December 15, 1977 by Cong. Lehman, Schroeder, Solarz, and Howard). Thus, it is quite plausible that Congress deliberately adopted without significant debate or controversy amendments that had as one of their intended effects *allowing* the Census Bureau to use sampling for apportionment.

Indeed, there is no other explanation for Congress's amendment of section 141(a) to add language authorizing sampling in the decennial census. As appellees admit, under their interpretation, the 1976 amendment to section 141(a) provided the Census Bureau no new authority to use sampling in conducting the decennial census despite the addition of this specific language. House Br. 30. Appellees argue that the purpose of the amendment was simply to clarify some ostensible ambiguity that existed in prior grants of authority to use sampling outside the context of apportionment. *Id.* at 30. But appellees do not explain what ostensible ambiguity was being clarified. Appellees also assert that because language added to section 141(d) did not have any substantive import,

and this language was identical to the language added to section 141(a), it can be inferred that Congress did not intend its amendment to section 141(a) to have any substantive import. But the language in section 141(d) was added *after* the language in section 141(a), in order to make it parallel to the latter section. *See* Gephardt Br. 19 n.10. Thus, the redundancy of the language in section 141(d) fails to overcome the presumption that Congress intended its amendment of section 141(a) "to have real and substantial effect." *Stone v. Immigration & Naturalization Serv.*, 514 U.S. 386, 397 (1995).

B. Appellees, While Relying on Supposed Indicia of Legislative Intent, Never Claim that Congress Affirmatively Intended to Bar the Use of Statistical Adjustments to Increase the Accuracy of the Census.

The second flaw in appellees' intent argument is that, while relying on evidence of intent outside the statutory text, appellees can produce not the slightest indication of a conscious legislative intent, in 1957 or 1976, to bar the use of sampling to *adjust* the census to make it *more* accurate. Indeed, the historical evidence suggests that Congress long approved of such techniques in the form of imputation and the 1970 statistical adjustments.

Appellees address the issue of congressional intent to bar statistical adjustments only in a single footnote in the House brief. House Br. 36 n.49. In that footnote, the House *never even claims that Congress ever opposed statistical adjustments like those at issue here.* Instead, it offers two unpersuasive arguments for ignoring this flaw in its position. First, it claims that the sampling plans for 2000 go beyond "adjustment." *Id.* That is just wrong. The Census Bureau in 2000 plans to mail

census forms to *every* household in the nation, just as it has in the past. *Report to Congress*, JA 59-62, 77-78. The Bureau will also provide census forms in public places such as shopping malls, and will publicize a toll-free telephone number for those who wish to respond by phone. *Id.* at 77-78. This is a headcount, and the Bureau's planned use of sampling is designed to adjust this initial headcount. There is simply no basis for arguing that a headcount requires a certain *number* of attempts to contact each household; at some point, the census has always stopped trying to contact nonresponding households. At a minimum, the second half of the Bureau's proposed method -- the ICM follow-up survey -- is an "adjustment" method under any theory, and could be separately upheld on that basis.

Second, the House argues that intervenors' "special plea for sampling-based adjustment" is not grounded in the plain text of the Act, which either allows the Census Bureau to use sampling or does not. House Br. 36 n.49. But intervenors are not making a "special plea for sampling-based adjustment." Intervenors' argument is that on its face the present version of the Census Act categorically allows sampling when reasonably accurate. It is appellees who argue for a departure from the best reading of the text based on a psychoanalysis of congressional intent. Intervenors have simply explained that if this Court is to adopt that kind of approach, it would be odd to reach a result that all parties seem to agree Congress never intended, based on the fact that the plain language of the statute -- using the single term "sampling" -- does not support a distinction between types of sampling. The way to avoid this conundrum is to resist the invitation to reject the best reading of the statutory text, and to conclude that the Act authorizes the Secretary (subject to constitutional and other constraints) to

proceed with the carefully developed methodology that he, in his expert judgment, has determined is best.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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